step that the Commission should take is to permit cable operators to rely on sworn declarations attesting to the system's calculation of its going forward adjustments, thereby restricting the ability of local authorities to engage in costly, time-consuming, and intrusive fishing expeditions into the highly sensitive area of program contracts. In addition, the Commission should automatically stay (subject to refund liability) local decisions disapproving going forward rate adjustments. While an automatic stay is an extraordinary remedy, the need for its use should be rare since the calculation of going forward rates should involve a relatively simple arithmetic exercise.[32] Moreover, an automatic stay will minimize the disruption of relationships between cable operators and programmers, reduce confusion among subscribers, and lessen the risk that a franchising authority's decision on going forward rate adjustments will intrude into a cable operator's constitutionally protected program selection activity.

2. "Reopening" Unchallenged Rates.

Under Section 623(c) of the 1992 Cable Act, non-basic rates are subject to review by the Commission only upon receipt of a

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[31](...continued) adjustment in retaliation for a rate increase on non-basic or an unregulated service. While the Commission might ultimately overturn the local decision, the regulatory delay would have imposed unrecoverable costs on cable operators and/or programmers.

[32]In the April 1993 Report and Order, the Commission recognized that external cost increases should be "presumed reasonable." April 1993 Report and Order, supra at ¶ 133.

valid complaint from a subscriber or franchising authority. Section 623(c)(3) of the Act specifically limits the filing of complaints to a "reasonable period of time following a change in rates," except that the Act allowed complaints to be filed against existing rates for 180 days after the effective date of the Commission's implementing rules. Pursuant to this provision, the Commission established February 28, 1994 as the cut-off for complaints regarding existing rates and adopted a 45-day window as the "reasonable period" for filing complaints regarding subsequent rate changes.[33]

The plain intent of the statutory limitation on the filing of complaints regarding non-basic rates was to avoid the uncertainty that would be created if the reasonableness of a system's non-basic rate was perpetually open to review. The Commission, however, has taken the position that a complaint against a rate increase subjects not only the incremental increase to review, but also the underlying rate, even if that rate has not previously been challenged. Thus, for example, if an operator whose non-basic rate was not challenged prior to February 28, 1994 adds new services to its non-basic tier and

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[33]See 47 C.F.R. § 76.953. The statutory language used the term rate "changes." 47 U.S.C. § 623(c)(3). The Commission has used the same term, indicating that valid complaints may follow decreases as well as increases. See also Third Order on Reconsideration, supra at ¶ 121. The legislative history, however, indicates that Congress intended to focus the review process on rate increases (both direct and indirect). See House Report, supra at 87 (after the initial 180-day window, "complaints may be filed only within a reasonable period following an increase in the cable rates") (emphasis added).

adjusts its rates accordingly, a single subscriber's complaint about the increase will trigger a review (and potential refund liability) of the entire rate, not just the increase.[34]

The Commission's approach is unquestionably at odds with the language and intent of the Cable Act. The deadlines mandated by Congress for complaining about rates is rendered meaningless if an unchallenged rate remains open to review for an indefinite period into the future. Moreover, if the Commission stands by its approach, cable operators will be extremely reluctant to add services to non-basic tiers, knowing that if they attempt to pass through the cost of the new channels, they could reopen to review a rate (or rate increase) that previously had failed to elicit any complaints. The Commission can and, indeed, must revise its rules to make clear that only the amount of the rate change triggering a complaint is subject to review and that rates (and rate increases) as to which no timely complaints have been filed are not reopened by subsequent rate changes.

3. Negative Option.

The 1992 Cable Act prohibits "negative option" billing practices by cable operators.[35] The Act's legislative history indicates that this prohibition "is not intended to apply to changes in the mix of programming services that are included in

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[34]Similarly, assume a system makes a going forward adjustment that is not challenged within the 45-day window; if the system subsequently makes another going forward adjustment that is challenged, both the original adjustment and the adjustment that prompted the complaint will be subject to review.

[35]47 U.S.C. § 543(f).

various tiers of cable service."[36] Consistent with this expression of legislative intent, the Commission indicated in its April 1993 Report and Order that merely adding channels to a regulated tier would not trigger an affirmative marketing obligation so long as there was not a "fundamental change" in the nature of the tier.[37] The Commission further indicated that "restructuring of tiers and equipment, including restructuring appropriate for implementing the Cable Act's provisions, will not bring the negative option billing provision into play if subscribers continue to receive the same number of channels and equipment."[38]

The Commission should reaffirm its interpretation of the scope of the Cable Act's negative option provision. In addition, the Commission should clarify, to the greatest extent possible, the circumstances under which the addition or deletion of channels from a regulated tier "fundamentally changes" that tier.[39] In this regard, the Commission should keep in mind that the subscribers must be given 30 days advance notice of the addition or deletions of services, changes in rates accompanying the addition or deletion of channels are subject to review, and

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[36]H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 65 (1992), reprinted in 1992 U.S.C.C.A.N. 1231.

[37]April 1993 Report and Order, supra at ¶ 440.

[38]Id. at ¶ 441.

[39]In the Commission's April 1993 Report and Order, "fundamental change" was characterized in terms of the elimination of an entire tier of services. Id. at note 1100.

subscribers are entitled to downgrade their service at no charge for 30 days following retiering or a rate increase.

Apart from reaffirming its view of the scope of the negative option provision, the Commission needs to reassert its previously stated position that state and local governments are preempted from treating as a "negative option" activities that would not be treated as such by the Commission. As discussed above, Congress has encouraged operators to unbundle services; the application of varying and possibly inconsistent state and local marketing requirements will frustrate the accomplishment of this important federal policy. Moreover, the success of most cable program networks is dependent on national (or at least regional) distribution. Thus, the need for uniform national negative option rules is critical. The Commission, however, has unwisely allowed state and local governments not merely to enforce the federal negative option prohibition (as uniformly construed by the Commission), but to establish their own "negative option" restrictions, some of which go far beyond any rational understanding of that term. As a result, cable operators could be forced to undertake the enormous expense of remarketing a service tier to every subscriber whenever a channel line-up change is contemplated.[40] Faced with the possible obligation to

[40]Recent action taken in Wisconsin against Time Warner bears out this concern. As has been widely reported, the State of Wisconsin brought suit against Time Warner alleging that the introduction of a la carte service offerings consisting of services previously delivered as part of a regulated tier violated state law prohibiting negative option billing because

(continued...)

remarket tiers to all subscribers, or the uncertainty of what obligations might be imposed among various states and communities, cable operators will be extremely reluctant to add new services.[41]

II. THE FCC'S GOING FORWARD METHODOLOGY FAILS TO ACCOUNT FOR SUBSTANTIAL INCREASES IN CHANNEL CAPACITY.

The Fifth Notice seeks comment on whether the Commission should establish a methodology for adjusting capped rates for systems with more than 100 regulated channels, and if so, what that methodology should be. The Fifth Notice suggests that the Commission could derive mathematical formulations from existing data and tables. Alternatively, it proposes to cap rates at the one hundred channel level unless the operator makes a cost-of-service showing.[42] As detailed below, both proposals would incorporate existing methodologies which are seriously flawed,

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[40](...continued)
the a la carte services had not been ordered in advance "by name." The Wisconsin decision is on appeal to the Seventh Circuit. If it is allowed to stand, its implications range far beyond the introduction of a la carte service offerings. For example, if a system wanted to take a large non-basic package and divide it into two separate tiers, the logic of the Wisconsin decision would suggest that the operator would first have to remarket each tier, even though all of the services are the same and the combined rate would be unchanged under the Commission's rules.

[41]The direct costs of affirmative marketing are significant, whether done by mail or by telemarketing. Moreover, if a subscriber fails to respond, the system would be required to disconnect the tier (or, in the case of a change to basic service, all service). Congress plainly did not intend to cause such significant disruptions in service in the name of consumer protection.

[42]Fifth Notice, supra at ¶ 256.

and create disincentives to the addition of regulated services on expanded channel capacity. Time Warner proposes that the Commission provide external treatment to the cost of a system upgrade that (1) increases capacity beyond 100 channels and (2) was required or approved by the franchise authority.

It is not possible to predict at this juncture the types of services to which cable operators will devote increased capacity beyond 100 channels. Time Warner is on the forefront of exploring the demand for such new services. In Queens, New York, it is developing Quantum, an interactive cable system based on a 150 channel "fiber to the neighborhood" network. In Orlando, Florida, Time Warner is developing a Full Service Network which could offer an unprecedented range of services and programming -- including video on demand, interactive educational instruction, home shopping and video conferencing as well as regulated program services. The Commission should not at this time limit the natural development of such additional services by adopting a methodology which would discourage the use of expanded channel capacity for regulated services. Rather, operators should be permitted to fully respond to marketplace demands, which the Commission has recognized as desirable.[43]

Initially, Time Warner submits that the Commission should not derive its methodology from the existing data tables. The Commission cannot reliably extrapolate from its benchmark table

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[43]Compare the Fourth Report and Order, supra at ¶ 242 (incorporation of the competitive curve will permit operators to respond to marketplace forces for the provision of new services).

and efficiency curve which, as the Fifth Notice recognizes, establish per channel rates for systems with less than 100 channels.[44] This data also reflect costs associated with existing delivery methods. It is not clear, however, what technologies would be involved in delivering more than one hundred channels of regulated service in the future, or what the costs of those technologies would be. As the Fifth Notice recognizes, increased capacity may result from compression and multiplexing techniques or from significant modifications or additions to distribution plant.[45] The implementation of new technologies should not be limited by the use of formulas based on the Commission's existing highly suspect database.

Furthermore, to derive formulas from the existing tables would further perpetuate the inherent weaknesses in that data and the current rate methodology. The Commission has presumed that its benchmark and price cap mechanisms, based upon data for "competitive systems," reflect rates which would allow most systems to recover their normal capital costs.[46] As other commenters have pointed out, however, the rates studied were premised on the assumption that future rate increases would not

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[44] Fifth Notice, supra at ¶ 256.

[45] Id. at ¶ 255.

[46] Report and Order and Further Notice Of Proposed Rulemaking, MM Docket No. 93-215 at ¶ 286 (rel. March 30, 1994) ("Cost Proceeding Report and Order").

be limited.[47] Thus, the benchmark tables do not properly account for competitive systems that planned to phase in the cost of upgrades through future rate increases. Moreover, the benchmark averages include data for systems that did not implement any upgrade, and thus do not provide the basis for a fair comparison with systems that upgrade to over 100 channels. Indeed, systems facing competition from an overbuilder were likely to have delayed upgrades in order to survive price wars over the most desirable areas of their franchise.

Nor should the Commission simply cap rates at the 100 channel level unless an operator justifies a higher rate through a cost-of-service showing. The requirement and uncertainty of a special showing -- even an abbreviated one -- would create an incentive against the use of expanded channel capacity for regulated services. Moreover, use of the current cost-of-service methodology for this purpose would also perpetuate a flawed system. The Commission now permits an abbreviated cost-of-service showing only for rebuilds or "significant upgrades" requiring added capital investment (e.g., expansion of bandwidth capacity and conversion to fiber), not "normal improvements."[48] While the use of a cost-of-service showing may be limited in other circumstances, where it is intended to serve as an

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[47] See Comments of Cablevision Industries Corporation, et al. in MM Docket No. 92-266, filed September 30, 1993 at 16; Reply Comments of Cablevision, et al. filed October 7, 1993 at 3; Comments of NCTA in MM Docket No. 92-266, filed September 30, 1993 at 13.

[48] Cost Proceeding Report and Order, supra at ¶ 287.

alternative rate methodology, there is no reason to adopt similar limits to upgrades in channel capacity if they are not otherwise subject to the benchmark or going forward methodology.

Furthermore, the existing rules require the operator to demonstrate that the capital investment will "actually benefit subscribers" through improvements in regulated services. An operator is also required to allocate the costs of the upgrade between regulated and unregulated services.[49] Time Warner submits there is no reason to make such artificial distinctions, even if it were possible to do so. System upgrades generally benefit all subscribers, through an increase in channel capacity for future service offerings and clearer signals and greater reliability on existing channels.

Time Warner submits that an operator should not be required to show that an upgrade required by a franchise agreement or franchising authority "actually benefits subscribers." Rather, any improvement required or authorized by the franchising authority should be presumed to benefit subscribers. As the Commission recognized in its First Order On Reconsideration, "[l]ocal authorities presumably are in a position to weigh the potential impact of any cost increases on subscribers at the time they require systems changes."[50] There is no reason for the Commission to review or second guess the decisions of the parties

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[49] Id. at ¶¶ 287, 289.

[50] First Order on Reconsideration, supra at note 160.

to the franchise. The same approach should be taken with respect to an upgrade which the franchising authority has approved.

In contrast, the existing cost-of-service showing for network upgrades could encourage abuse by franchise authorities, which could require an upgrade, but then deny or challenge the associated rate increase. Recovery for upgrades may also be problematic where a system is subject to the jurisdiction of more than one franchising authority, or both a local and state level authority.

Time Warner believes that the most effective and sensible approach would be to allow recovery of the cost of upgrades which were required or approved by the franchise authority without need for a cost-of-service showing, particularly for those upgrades that expand capacity beyond 100 channels. External treatment of such costs would guard against the possibility of arbitrary or inconsistent actions by local authorities, while serving the Commission's regulatory goal of assuring the growth of the cable industry, introduction of new technologies, and provision of new services.[51] External treatment is consistent with the 1992 Cable Act, which requires the Commission to adopt standards to identify costs attributable to certain services required by a franchise.[52] As Time Warner explained in its September 30, 1993 Comments in response to the Third Notice of Proposed Rulemaking, there is simply no reason to treat the cost of system upgrades any

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[51]Fourth Report and Order, supra at ¶¶ 231, 238, 242.

[52]47 U.S.C. § 543(b)(4).

differently than other franchise costs required by the franchise authority or agreement. All such costs are outside the operator's control, and required as a condition of providing service. Furthermore, because a system upgrade will benefit all subscribers, external treatment should be provided to all costs associated with the upgrade, without distinguishing between regulated and unregulated services provided on expanded channels.

III. COMMERCIAL RATES SHOULD REMAIN UNREGULATED.

The Fifth Notice seeks comment on whether the Commission should regulate rates for "regulated cable service provided to commercial establishments," whether commercial rates should be used to offset residential rates, and, if the Commission regulates commercial rates, what standards should govern commercial rates. As shall be demonstrated below, Time Warner submits that regulation of commercial rates is neither permitted, nor was it intended, by Congress.

A. Congress Did Not Intend For Commercial Cable Rates To Be Regulated.

Congress debated at length the scope of cable rate regulation incorporated in the 1992 Cable Act. At no point during this extensive deliberation did Congress, either explicitly in the statute or in the legislative history, express a concern that commercial rates were unreasonable, were not subject to effective competition, or should be regulated by the Commission. The 1992 Cable Act's legislative history does not indicate any problems regarding commercial cable rates that would justify regulation. Rather, the legislative history is dominated by questions of consumer protection and effective competition standards based on the number of household subscribers; the debate focused exclusively on residential consumers.[53]

The Commission may only regulate rates to the extent provided for under Section 623(a)(1) of the 1992 Cable Act.[54] Section 623(a)(2) describes the scope of regulation intended by the Cable Act:

> If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section.

Thus, the Commission may regulate only the rates of those systems not subject to effective competition.

In defining the standard for effective competition under Section 633(l), and thus defining the scope of permissible rate regulation, Congress focuses exclusively on <u>households subscribing to cable service of a cable system</u>. According to the statute,

> The term 'effective competition competition' means that --
> (A) fewer than 30 percent of the <u>households</u> in the franchise area subscribe to the cable service of a cable system.[55]

As is explained below, "households" do not include commercial establishments.

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[53]<u>See</u> H.R. Rep. No. 628 at 30-34; H.R. Conf. Rep. No. 862 at 62-66.

[54]"No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and Section 612." 47 U.S.C. § 543(a)(1).

[55]47 U.S.C. § 543(l)(1)(A) (emphasis added).

In accordance with Congress' intent that commercial rates not be regulated, the Commission has adopted a limited regulatory framework. In establishing the existence of "effective competition," the Commission adopted the Census Bureau definition of "household," which requires "full-time residents."[56] Under this framework, not even seasonal homes can be counted as "households" for purposes of defining "effective competition."[57] Further, in the Commission's 1994 FCC Fact Sheet re Form 1200, "subscriber" is defined as a "household that receives cable service."[58] Within this definitional framework, rate regulation of commercial use is neither contemplated nor is it compatible with existing regulation of residential rates.

Accordingly, Time Warner suggests that the Commission adopt a formal definition of "commercial subscriber" and "commercial rates." Such definitions should cover non-residential business entities that subscribe to cable service. Included within such a definition of "commercial subscriber" would be bars, restaurants, hotels, offices, brokerage houses, retail stores, etc.[59]

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[56] Third Order on Reconsideration, MM Docket 92-266, 74 RR 2d 1274, ¶¶ 3, 15 (1994).

[57] Id.

[58] 1994 FCC Fact Sheet re Form 1200 (rel. April 29, 1994).

[59] Non-profit organizations should also be included in this definition. They are non-residential entities that subscribe to cable for a "business" purpose -- to fulfill their respective missions. This contrasts with a residential customer who merely seeks to be entertained and informed for personal, non-business related reasons.

Otherwise, if commercial establishments are deemed to be "households" subject to potential regulation, then all commercial establishments would have to be counted as households in order to determine whether the affected cable systems were subject to effective competition. Many more cable operators would therefore be subject to effective competition, because they would most likely have less than 30 percent penetration of "homes" passed.[60] For example, in Brooklyn, NY, Time Warner currently serves approximately 80,000 residential subscribers out of approximately 228,000 homes passed, for a penetration rate of 35.1 percent. However, if Brooklyn's businesses (which number 67,461, according to Time Warner's latest count) are included, the penetration rate drops to 27.6 percent, due to the significantly lower number of such businesses subscribing to Time Warner's cable service (1422 out of 67,461, or 2.1 percent). Thus, Time Warner's Brooklyn system would be deemed to face "effective competition," as defined by the 1992 Cable Act, if the Commission concludes that commercial establishments are "households" subject for rate regulation purposes. It is absurd to argue either that Congress intended to relieve the majority of cable systems from rate regulation, or that commercial establishments are "households."[61]

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[60]Id.

[61]The Commission's rules do not exclude seasonal homes from rate regulation, even though, as is noted above, the Commission prohibits counting such homes for purposes of measuring effective competition. The Commission has failed to recognize the nexus between the two. If a home is served by cable to the extent that regulation is required, there is no reason not to count the home (continued...)

The 1990 House Report offers an additional policy reason for the imposition of cable rate regulation:

> [M]any consumers subscribe to cable television largely for the antenna service it provides; that is, cable television can provide them with superior reception of broadcast signals . . . The Committee believes that consumers who wish to purchase only an antenna service should be able to do so without the requirement of purchasing additional programming.[62]

Congress appears to prefer that residential users be able to have access to local broadcast television stations, accessible through a low-cost basic tier. However, as is explained above, commercial cable subscribers are not within this same protected sphere. It makes no sense to reward commercial users with cable service at below market rates upon such a content-based rationale.

B. There Are No Valid Policy Reasons Why Commercial Rates Should Be Regulated.

Congress' expressed policy concerns warranting cable rate regulation of residential cable rates cut strongly against regulation of commercial cable rates. No policy maker has argued that commercial subscribers be lumped together with residential subscribers for purposes of rate regulation.

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[61](...continued)
in the effective competition measurement. Conversely, if the home is not to be counted for effective competition, cable service to the home should not be regulated. The Commission should not perpetuate its mistake in this area by regulating rates to commercial establishments without permitting such establishments to be counted in the effective competition test.

[62]H.R. Rep. No. 682, 101st Cong., 2d Sess. 76-77 (1990).

1. Commercial Rates Must Be Considered Separately From Residential Rates Due To The Added Value <u>Businesses Receive From Cable TV Service.</u>

Congress never specifically considered regulating commercial rates, most likely because the nature of commercial use of multichannel video services, by a restaurant, bar, or other business, is vastly different from the nature of residential use. Home consumers use cable for personal entertainment and for access to the "marketplace of information." In other words, home consumption is content driven and value is derived in terms of the actual information absorbed by subscribers.

On the other hand, commercial consumption is profit driven, its value derived in terms of the increased business and patronage that video service brings to a business. Commercial users often subscribe to cable service purely for the benefit or convenience of their own customers. Unlike residential subscribers, the majority of commercial subscribers are not concerned with the content of the information transferred to them (except to the extent it attracts customers); they are primarily concerned with attracting additional business by offering cable service to their customers.

For example, consider a sports bar. Sports programming provided by the bar is the principal reason why most patrons come to the bar. Such establishments might even require their patrons to pay admission or a cover charge. Because these bars distribute cable programming to customers, they earn increased profits from cable by selling these viewers drinks and food.

Such a use, typical of commercial uses of cable, clearly provides an economic value to the commercial user many times that which is conferred upon a residential subscriber. It makes no sense to regulate such a commercial use, and certainly not in the same manner as residential use.

In fact, Congress has long recognized such a distinction between commercial and private use of information content in the copyright laws.[63] In determining whether certain conduct constitutes a copyright infringement, courts recognize that certain acts of duplication are defensible as "fair use." An essential consideration of whether a particular use is a "fair use" is whether the purpose and character of the use is "commercial" or not. As such, profit-motivated commercial uses are distinguished from non-profit, educational uses.[64] Included in the latter category are non-commercial and non-profit activity undertaken at home for private enjoyment.[65] The same distinction should be made for rate regulation of cable service; commercial,

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[63]See 17 U.S.C. § 107 (1993) ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . . (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.").

[64]See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984). See also Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

[65]See Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc., 866 F.2d 278, 281 (9th Cir. 1989). See also Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 780 F. Supp. 1283, 1293 (N.D. Cal. 1991), aff'd, 964 F.2d 965 (9th Cir. 1992).

profit or business-motivated use of cable should be distinguished from private, non-profit use of cable in the home.

2. Cable Service To Businesses Is Very Different From Cable Service To Homes.

Time Warner and many other cable operators package and sell cable services very differently to businesses than to residences, which is a fundamental reason why such services are priced differently. The principal difference is that many of these business dictate the precise content of their cable service packages to Time Warner. For example, in New York City, Time Warner has negotiated individually with a national television network to provide it with a specially tailored cable feed for a flat fee. The customer chooses a number of channels it wants to receive, and chooses the exact complement of programming services to be provided over such channels. The customer then distributes this specially tailored package of services throughout its offices, where it is used for business purposes. In the case of this network, the programming mix contains a greater concentration of news and international programming than is typically contained in Time Warner's service package available to residential customers.

Similarly, Time Warner has established "mini-headends," instead of merely installing converters, at many hotels, brokerage houses, and other businesses. Again, each business chooses a different mix of services that is uniquely negotiated by and tailored to that business. For instance, some hotels in New York City cater to Asian business travellers, and thus choose a relatively large percentage of Asian programming. In contrast, brokerage firms often choose CNBC, CNN and other news and information services. These businesses then distribute the cable programming to their hotel rooms, individual offices, etc.

In such cases, Time Warner typically negotiates individually with the business over price and number of channels, and must tailor its service offerings specifically to the unique needs of each commercial customer. As a result, the price to each business can vary widely. This is a completely different framework than Time Warner's provision of cable service to residents, who must choose from the cable operator's established lineup of programming packages and are charged uniform prices. If Time Warner were forced to provide and price services to businesses the same way, Time Warner's unregulated competitors would, by default, be the only providers capable of serving the specialized needs of such customers, and commercial users would be deprived of the benefits of the competitive choice to obtain service from Time Warner.

For example, attached as Exhibit A are commercial and residential rate cards from Liberty Satellite Sports ("LSS"), a national satellite sports programming distributor. As these rate cards demonstrate, LSS's commercial rates are $75-$200 per month, depending on the package of service offered. In contrast, LSS's residential rates are approximately $10 per month for a broad array of programming services. Likewise, Time Warner understands that ESPN sells its programming in a package with ESPN2 for $600 per year for C-band satellite delivery to commercial subscribers, versus $39.96 per year to residential backyard dish subscribers for the same programming. It would be patently unfair to destroy Time Warner's flexibility in tailoring programming packages to commercial subscribers by forcing price uniformity upon Time Warner, while competitors like LSS and ESPN remain free to offer diverse programming packages and pricing.

It should also be noted that Time Warner's ability to gain access to commercial premises is typically a much lengthier process than access to residential premises. In seeking to provide service to commercial establishments, Time Warner must negotiate with landlords as well as tenants, resulting in added time and expense. This process highlights not only commercial customers' increased bargaining power compared to residential customers, but also the extra costs in providing commercial service, which cable operators have the right to recover.[66]

The fundamental differences in the nature of the business of providing cable service to commercial customers is also highlighted by an analysis of the competitive situation. Home Satellite dishes, SMATV, DBS, and MMDS have made widespread inroads in the provision of video services to commercial users. For example, Time Warner's cable systems in New York City, NY compete with numerous SMATV operators for commercial customers. Time Warner's New York City systems also compete with the LodgeNet, OnCommand, Spectradyne and GuestServe video program

[66]See 47 U.S.C. § 543(b)(2)(C).

packaging services in many hotels. Many restaurants and bars have installed dishes to receive video programming directly from C-band satellites. Not only are there a wide array of providers offering a variety of products and pricing, commercial entities benefit enormously from the high value these services bring to their business.[67]

Because of the existence and success of these competitors, as well as the different motivation and purposes underlying a decision by a commercial user to subscribe to cable television, cable operators encounter vastly different penetration rates between residential and commercial subscribers. For example, Time Warner's penetration of residences in Manhattan, Queens, and Brooklyn, New York is as follows:

Manhattan	58.1%
Queens	44.7%
Brooklyn	35.1%

However, Time Warner's penetration of businesses in these three boroughs is infinitesimal in comparison:

Manhattan	3.7%
Queens	1.5%
Brooklyn	2.1%

These figures demonstrate the presence of numerous competitors to Time Warner in the provision of video programming to commercial establishments. At minimum, they demonstrate that cable service

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[67]See also discussion in Section III.B.1., supra.

to businesses requires a completely different analysis than does service to residences.

Since both the cable programming itself and the bargaining over the price of such programming is vastly different for commercial users than for residences (and differs widely even among commercial users), it makes no sense to use residential cable rates as a model to regulate commercial cable rates, or, for that matter, to regulate commercial cable rates at all.

3. Alternative Non-Cable Multichannel Video Providers Are Best Promoted Through Deregulation Of Commercial Cable Rates.

A stated goal of regulation is to promote alternative competition by SMATV, DBS, MMDS, etc.[68] It follows that implementation of the 1992 Cable Act should promote, not impede, such competition. However, rate regulation of commercial cable rates at below competitive prices would result in an unintended consequence of harming, rather than helping such potential competitors. If commercial users were able to obtain multichannel video services at residential rates far below what the marketplace would ordinarily dictate, alternatives to cable would be at a substantial competitive disadvantage. Far fewer commercial users would choose SMATV, DBS, or MMDS because they could obtain essentially the same or better service from the cable provider at a drastically below-market price. Continued deregulation of commercial rates, on the other hand, would

[68] H.R. Rep. No. 628 at 27.

improve these competitors' positions, putting them on equal terms with cable providers.

C. If The Commission Decides That Commercial Rates Can Be Regulated, Commercial Rate Regulation Should Be On A Different Basis Than Residential Rate Regulation.

If the Commission determines that it should regulate commercial rates, Time Warner argues in the alternative that commercial rate regulation should be on a basis independent from residential rate regulation.

1. If The Commission Decides To Regulate Commercial Rates, They Should Be Unrelated To Residential Rates.

As stated above, healthy competition undeniably already exists for commercial provision of cable television. Many commercial establishments commonly use alternative non-cable video providers.[69] Moreover, as is explained above, commercial users subscribe to video services because it furthers their business purposes to do so. Indeed, as in the case of a brokerage firm subscribing to CNBC or a sports bar subscribing to ESPN, even where business users need the information provided over the cable system, it is for business purposes. Thus, if commercial rates are to be regulated at all, the Commission must take into account the different price/value and demand factors

[69]The Commission has itself recognized the nationwide availability of SMATV service. April 1993 Report and Order, supra at ¶ 31, Third Order on Reconsideration, supra at ¶ 8. Even a cursory inspection of the rooftops in most urban areas documents the ubiquitous competition from direct satellite distributors.

applicable to commercial customers rather than blindly apply its residential cable rate structure.

Because of business profits earned from the reception of cable programming, the value of video services to most commercial users is many times what a cable provider could recover through rates based on residential use. A truly reasonable rate level for such commercial users would be one that reflects the value in increased profits that commercial users achieve from receipt of the service. In other words, what is a reasonable rate for a commercial user may be much higher than what is reasonable for a residential user. To allow commercial users to obtain service at prices dramatically below the true value of the service to those users provides an unreasonable windfall to commercial users.

Moreover, the FCC's current benchmark methodology was not designed to apply to commercial rates and the customized programming packages often supplied to commercial accounts. Indeed, the Commission's rate survey used to derive the benchmark tables collected information regarding cable operator's "basic" and "tier" levels of service regularly provided to residential customers; the survey contained no schedules for collection of data regarding commercial rates. Similarly, Forms 393 and 1200 are not designed to produce reasonable rates for commercial customers.[70] Thus, if the Commission decides to regulate

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[70] See, e.g., Form 1200, instruction for Line A6 (Basic and Cable Programming Service tier rates are calculated in terms of standard rate card; data does not take into account individually negotiated commercial rates and service packages).